

William L. Buus (SBN 180059)
SCHIFFER & BUUS APC
3070 Bristol Street, Suite 530
Costa Mesa, CA 92626
Telephone: (949)825-6140
Facsimile: (949)825-6141
Email: wbuus@schifferbuus.com

Attorneys for Defendants
IGOR OLENICOFF and
OLEN PROPERTIES CORP.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DONALD WAKEFIELD,)	Case No.: 8:12-CV-02077-AG-RNB
Plaintiff,)	DEFENDANTS' MEMORANDUM
)	OF POINTS AND AUTHORITIES IN
vs.)	OPPOSITION TO PLAINTIFF'S
)	MOTION TO REOPEN THE
IGOR OLENICOFF, OLEN)	EVIDENCE
PROPERTIES CORP., and DOES 1)	
through 10, inclusive,)	Date: November 10, 2014
)	Time: 10:00 a.m.
Defendants.)	Courtroom: 10D

I. INTRODUCTION

After stripping Plaintiff DONALD WAKEFIELD's emotional denunciations contained in his brief in support of his motion to reopen the evidence, we are left with what we had all along: a case where Mr. Wakefield has failed to prove any actual damages or any likelihood of future irreparable harm. Without those things, Mr. Wakefield has no remedy in this action and, despite the jury's verdict finding of infringement, defendants respectfully believe the Court has no other choice but to enter judgment in defendants' favor. This is not anyone's fault, except possibly Mr. Wakefield's, and his insistence that a refusal of the requested preliminary injunction would render the Copyright Act meaningless rings hollow since he simultaneously urges the Court to do something against the weight of Supreme

1 Court and Ninth Circuit authority. As for Mr. Wakefield's motion to reopen the
 2 evidence, it should be denied for the following reasons:

- 3 • While defendants admit that the existence of the Two Venture Plaza
 4 sculpture was never disclosed in the present action, that was due to mere
 5 oversight and inadvertence and not to any "active" or "knowing"
 6 concealment; on the other hand, Mr. Wakefield has failed to introduce
 7 sufficient evidence showing he was reasonably diligent in independently
 8 investigating the scope of any claims he may have against the defendants
 9 and/or other parties;
- 10 • The importance or probative value of the proffered evidence is *de*
 11 *minimus* if not nil in light of Mr. Wakefield's failure to prove actual
 12 damages or likely irreparable harm, and such proffered evidence would
 13 simply not change the case's outcome; and,
- 14 • What Mr. Wakefield is attempting to do is to improperly assert an
 15 additional cause of action that was not pled in his Complaint without
 16 affording the defendants a reasonable and fair opportunity to prepare for
 17 the defense of, and defend against, that claim.

18 **II. ARGUMENT**

19 **1. ANY FAILURE TO DISCLOSE THE EXISTENCE OF THE** 20 **TWO VENTURE PLAZA SCULPTURE WAS DUE TO** 21 **OVERSIGHT AND NEGLECT, AND MR. WAKEFIELD HAS** **NOT SHOWN THAT HE HAS BEEN DILIGENT.**

22 As Mr. Wakefield indicates in his brief, in order to obtain the relief he
 23 desires, he must provide a bona fide explanation as to the reason he failed to
 24 introduce the evidence at trial. See *Love v. Scribner* (S.D. Cal. 2010) 691
 25 F.Supp.2d 1215, 1235. As an initial point, he argues that defendants actively and
 26 knowingly concealed the existence of the sculpture located at Two Venture Plaza,
 27 thereby preventing him from discovering its existence. Yet, as detailed in Mr.
 28 Olenicoff's declaration filed and served with this brief, the failure to identify that

1 sculpture during discovery was a mere oversight. Mr. Olenicoff was so focused on
2 the sculptures that were actually mentioned in Mr. Wakefield's Complaint, that his
3 attention was taken away from Two Venture Plaza, and he merely forgot about the
4 sculpture there. As Mr. Wakefield admits, Olen-related entities own and/or control
5 a large number of properties, and it is completely reasonable to believe that any
6 memory that Mr. Olenicoff once had of the Two Venture Plaza sculpture had been
7 clouded by his focus on Mr. Wakefield's complaint and the sculptures at issue in
8 the case, not to mention his focus on the daily tasks and concerns relating to his
9 business operations and his life.

10 Furthermore, it appears Mr. Wakefield has been less than diligent in
11 investigating his claims. At trial, he testified he originally saw *Untitled* at 7
12 Corporate Plaza in April of 2008, that he thereafter attempted to follow up with
13 Olen Properties about it but to no avail, and that after a significant amount of time
14 had passed, he learned of the existence of other similar sculptures at Century
15 Centre and Olen Pointe Brea. In November of 2012, months after he learned about
16 those additional sculptures, he filed suit.

17 But Mr. Wakefield fails to explain why, after he discovered multiple copies
18 of *Untitled*, he did not perform any further independent investigation into the
19 possible existence of other copies of Human Nature's Many Faces at other Olen-
20 related properties. He suggests that, after suit was filed, he relied entirely upon
21 discovery under the Federal Rules of Civil Procedure to complete the investigation
22 he started, but does not explain why during the course of this litigation he did not
23 visit other Olen-related properties, including Two Venture Plaza, which is located
24 in the same city as Century Centre (i.e., the City of Irvine). Such an independent
25 investigation would have been reasonable in light of Mr. Wakefield's previous
26 discovery of additional *Untitled* copies at Century Centre and Olen Pointe Brea,
27 Mr. Olenicoff's deposition testimony in which he stated that he "honestly [did not]
28 recall" how many copies of Human Nature's Many Faces were purchased

(Declaration of Gene Brockland in Support of Motion, Exhibit 3 [Deposition of Igor Olenicoff] 63:4-7), and defendants' written discovery responses in which they reserved the right to supplement them because investigation and discovery were not then complete (*Ibid.*, Exhibit 2, Special Interrogatory No. 4; Exhibit 3, Special Interrogatories 5 and 9).

It would not have taken an "exhaustive" search, as Mr. Wakefield phrases it, but rather a reasonable one, to have found the sculpture at Two Venture Plaza in Irvine. According to his trial testimony, he already accessed and explored the Olen Properties website where commercial and residential properties were identified, so Mr. Wakefield already knew where to look. He never did so, and only recently found out about the sculpture through some third party. Although Mr. Wakefield wishes to point the finger at defendants for their neglect by failing to disclose that sculpture during discovery, he should also consider his own lack of reasonable diligence as a cause of his own ignorance.

2. THE PROFFERED EVIDENCE IS NOT IMPORTANT OR PROBATIVE AND, IF ADMITTED, WOULD NOT CHANGE THE CASE'S OUTCOME.

In order to obtain the relief Mr. Wakefield desires, he must also demonstrate the importance and probative value of the additional, newly discovered evidence. See *Love v. Scribner* (S.D. Cal. 2010) 691 F.Supp.2d 1215, 1235. In the context of a motion for new trial based upon a claim of newly discovered evidence (which possesses factors similar to those relating to a motion to reopen¹), Mr. Wakefield would be required to show that the evidence was material and would likely change the outcome of the case. *Far Out Productions, Inc. v. Oskar* (9th Cir. 2001) 247 F.3d 986, 998. Mr. Wakefield, however, is unable to show that the evidence is

¹ To prevail on a new trial motion based upon newly discovered evidence, the moving party must establish (1) the evidence in question was discovered after trial, (2) he or she exercised due diligence to discover the evidence before the end of trial, (3) the evidence is material and not merely cumulative or impeaching, and (4) the new evidence would likely have changed the outcome of the case. *Far Out Productions, Inc. v. Oskar* (9th Cir. 2001) 247 F.3d 986, 998.

1 important or material, or that it would likely change the outcome of the case.

2 First of all, the existence of this additional sculpture does not in any way
3 change the fact that Mr. Wakefield has presented insufficient evidence as to actual
4 damages or as to future irreparable harm to his financial interests or reputation, and
5 does not change the fact that he has made an insufficient showing that his legal
6 remedy is inadequate or that the balance of the hardships tips in his favor. None of
7 that is in any way affected by the existence of the sculpture at Two Venture Plaza.

8 Mr. Wakefield argues for the first time that the Court could infer that he has
9 lost “unascertainable customers” as a result of the continued display of the
10 sculptures, but does not state how that could logically be the case since he does not
11 sell, and has never attempted to sell, copies of *Untitled*. He also fails to explain
12 logically how he could lose potential customers for sculptures possessing different
13 designs if the sculptures at issue remained on display. Simply put, not only is this
14 argument unsupported by the evidence, it is contradicted by the evidence.

15 Additionally, Mr. Wakefield argues for the first time that his “loss of
16 control” over his copyrighted design constitutes the irreparable harm he would
17 suffer if an injunction is not granted, citing *Taylor v. Four Seasons Greetings LLC*
18 (8th Cir. 2005) 403 F.3d 958. Mr. Wakefield incorrectly suggests that the Court
19 may imply or infer irreparable harm since the defendants are infringing his
20 copyright and he has thus lost control over the design. That suggestion, however,
21 is legally incorrect and would swallow the rule requiring a plaintiff to show actual,
22 imminent irreparable harm. Moreover, Mr. Wakefield takes a quote from that case
23 out of context. In *Taylor*, the plaintiff did not want to seek monetary damages and
24 in fact waived them because he did not want such damages to constitute a “forced
25 license” to allow defendant to use his copyrighted work. Based upon that, he
26 sought a permanent injunction only, which was granted based, in part, upon a
27 showing of actual harm. Unlike that case, however, Wakefield primarily sought
28 monetary damages here which, if adequately proven, would have amounted to a

1 forced license to use his copyrighted work, and he has never waived that right to
2 continue pursuing those damages. Moreover, Mr. Wakefield has failed to prove
3 any harm whatsoever stemming from the continued display of the sculptures.

4 Plus, yet again, the authority cited by Mr. Wakefield in support of his
5 arguments consist of cases involving competitors selling infringing goods to
6 potential customers of the copyright holder. That is obviously not the case here.

7 Furthermore, although Mr. Wakefield insists upon arguing that his
8 reputation and goodwill will be harmed by the continued display of the sculptures,
9 he has not identified any evidence he presented to support that argument. He
10 points to his testimony concerning his image as a one-of-a-kind artist, but fails to
11 identify any evidence presented at trial suggesting that this image would in any
12 way be tarnished by the continued display of the sculptures.

13 Finally, Mr. Wakefield's suggestion that the existence of this additional
14 sculpture somehow demonstrates that defendants are predisposed to place
15 additional copies of *Untitled* at other commercial properties in the future, and his
16 argument that such anticipated conduct should be stopped to avoid a multiplicity of
17 lawsuits, are meritless. Indeed, these points contradict Mr. Wakefield's argument
18 that the Two Venture Plaza sculpture existed, but was never disclosed, during the
19 litigation. If we take that argument as being true, then Mr. Wakefield has merely
20 proven that a sculpture was not disclosed or discovered during the course of
21 litigation, but not that defendants will necessarily install additional copies of
22 *Untitled* at other Olen-related properties in the future. Therefore, at most, Mr.
23 Wakefield has shown that a possible additional act of infringement occurred
24 sometime in the past, but not that other acts of infringement will occur in the
25 future. Indeed, defendants do not intend to purchase and install additional copies
26 of *Untitled*. Consequently, whether or not a permanent injunction should be
27 granted is not in any way elucidated by the "new evidence" Mr. Wakefield wishes
28 to introduce.

On a related point, Mr. Wakefield incorrectly argues in support of his motion for preliminary injunction that every day the sculptures remain on display gives rise to a new and separate cause of action against defendants as to those sculptures. That is wrong. If that argument was correct, then this Court would not have granted summary judgment as to the sculpture located at the Newport Beach property based upon the expiration of the statute of limitations. Moreover, under the Supreme Court's recent decision in *Petrella v. Metro-Goldwyn-Mayer, Inc.* (2014) ___ U.S. ___, 134 S.Ct. 1622, the Court stated that a copyright claim arises for each *discrete* infringing act that causes harm over and above the harm that earlier acts caused. *Id.* at 1669-1670, & n.6. In this action, each day the sculptures remain on display does not constitute a *discrete* act of infringement that causes harm over and above the harm that the earlier act of installation caused and, therefore, Mr. Wakefield's argument that a multiplicity of lawsuits over the same sculptures will result if a preliminary injunction is not granted.²

3. PLAINTIFF IS ATTEMPTING TO ASSERT A CAUSE OF ACTION THAT WAS NOT PROPERLY PLEADED WITHOUT AFFORDING DEFENDANTS A REASONABLE AND FAIR OPPORTUNITY TO PREPARE FOR THE DEFENSE OF THAT CLAIM.

Notwithstanding what has been discussed above, this motion is procedurally improper. By this motion, Mr. Wakefield is attempting to assert another cause of action in this case without having to plead it.

It is well settled that each separate act of copyright infringement constitutes a separate claim upon which an action may be brought. *Seven Arts Filmed Entertainment Ltd. v. Content Media Corp. PLC* (9th Cir. 2013) 733 F.3d 1251, 1254; see *Roley v. New World Pictures, Ltd.* (9th Cir. 1994) 19 F.3d 479, 481

² This concept was also embraced in an previous District Court decision in which the court held that, in an action alleging the infringement of a copyrighted architectural drawing, each home built outside the limitations period constituted a barred claim and each home built within the limitations period constituted a claim plaintiff could pursue. *King Empire, Inc. v. Milan Courtyard Homes, Ltd.* (S.D. Tex. 2001) 173 F.Supp. 649.

[holding that claims relating to acts of infringement occurring outside of the limitations period are barred and claims of acts of infringement occurring inside the limitations period may be pursued]. It is also well settled that a complaint must allege sufficient factual matter in order to state a claim for relief. *Ashcroft v. Iqbal* (2009) 556 U.S. 662, 678, 129 S.Ct. 1937; *Valadez-Lopez v. Chertoff* (9th Cir. 2011) 656 F.3d 851, 858-59.

Therefore, in order for Mr. Wakefield to assert a separate claim against defendants for copyright infringement relating to the Two Venture Plaza sculpture, he must allege sufficient facts supporting that claim in some complaint, which he has not done here. And, because he has not alleged that claim in the operative complaint here, any evidence supporting that claim should be excluded as irrelevant and unfairly prejudicial in the sense that its introduction and admission at this time would deny plaintiffs a fair opportunity to investigate and develop in discovery and at trial any potential defenses to the claim, including a statute of limitations defense. Thus, the relief he requests, if granted, would be unfairly prejudicial to defendants and, consequently, the motion ought to be denied.

III. CONCLUSION

For reasons set forth above, Mr. Wakefield's motion to reopen the evidence should be denied.

Dated: October 20, 2014

SCHIFFER & BUUS APC

/s/ William L. Buus
By: William L. Buus
Attorneys for Defendants
IGOR OLENICOFF and
OLEN PROPERTIES CORP.

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of eighteen (18) years and am not a party to the within action. My business address is that of 3070 Bristol Street, Suite 530, Costa Mesa, California 92626.

I hereby certify that on October 20, 2014, I electronically filed the foregoing DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION TO REOPEN THE EVIDENCE with the Clerk of the Court using ECF which will send notification and a copy of such filing to the following persons:

Michael D. Kuznetsky, Esq. mike@kuzlaw.com KUZNETSKY LAW GROUP, P.C. 6565 Sunset Blvd., Ste. 311 Hollywood, CA 90028 Tel.: (818) 753-2450 Fax: (818) 736-9099 Counsel for Plaintiff DONALD WAKEFIELD	Gene J. Brockland, Esq. gjb@herzogcrebs.com HERZOG CREBS LLP 100 North Broadway, Suite 1400 St. Louis, MO 63102 Tel: (314) 231-6700 Fax: (314) 231-4656 Counsel for Plaintiff DONALD WAKEFIELD
Julie A. Ault, Esq. jault@olenproperties.com Leslie Vandale, Esq. lvandale@olenproperties.com 7 Corporate Plaza Newport Beach, CA 92660 Tel.: (949) 719-7212 Fax: (949) 719-7210 Counsel for Defendants IGOR OLENICOFF and OLEN PROPERTIES CORP.	

Executed on October 20, 2014, at Costa Mesa, California.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ William L. Buus